LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JAN 30 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1154

In the Matter

of

BLAIR & CO., INC.,

Debtor.

JOHN P. FOLEY, JR., J. P. FOLEY & CO., INC. and ANITA SALISBURY,

Petitioners,

against

BLAIR & CO., INC. and PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc. for BLAIR & CO., INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS

HARVEY R. MILLER
Attorney for Respondents
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

CHARLES SELIGSON,
MICHAEL L. COOK,
DONALD J. ZOELLER,
Of Counsel.

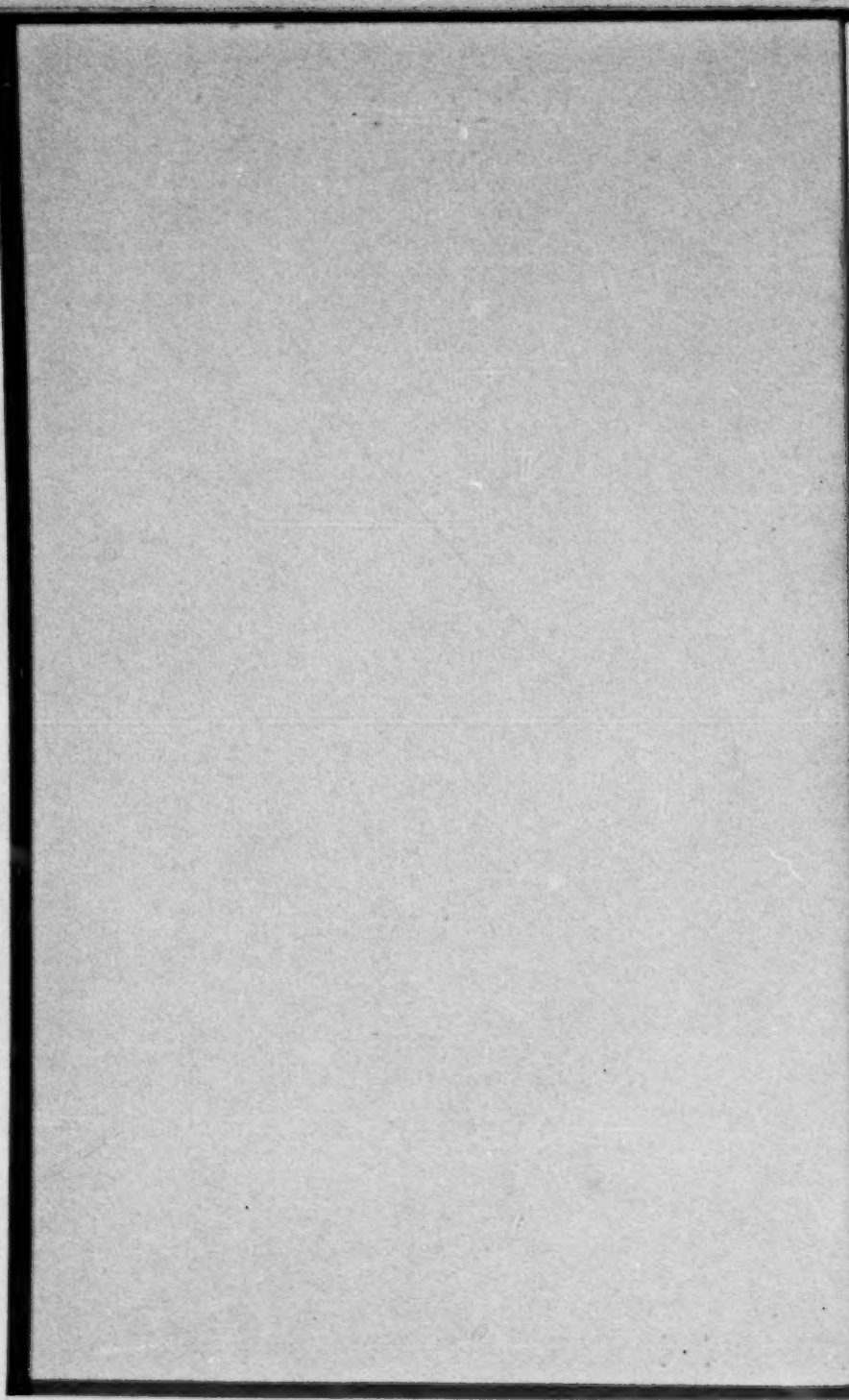

TABLE OF CONTENTS

	PAGE
Orders and Opinions in the Courts Below	1
Jurisdiction	3
Statute Involved	3
Question Presented for Review	3
Statement of the Case	4
Summary of Argument	8
Argument	
I—The question presented is moot and the writ of certiorari should be dismissed	12
A. The ordinary bankruptcy proceedings affecting Blair have been stayed and Blair's assets are being administered in accordance with the provisions of Chapter XI of the Bankruptcy Act	13
B. The enactment of the Securities Investor Protection Act of 1970 also renders academic the issue on appeal	16
II—A liquidating agent is not a "receiver" or "trustee" within the meaning of Section 3a(5) of the Bankruptcy Act and his appointment does not affect the rights of creditors	19
A. The Liquidator is not a receiver or trustee	19
B. The Liquidator could not affect the rights of Blair's creditors	28

PAGE

III—The legislative history and statutory context of Section 3a(5) of the Bankruptcy Act demonstrate that a liquidating agent is not a "receiver" or "trustee" 32

A. The Legislative History of Section 3a(5) 33

1. The Bankruptcy Act of 1898 and Its 1903 Amendment 33

2. The 1926 Amendment 35

3. The 1938 Amendment 37

B. The Statutory Context of Section 3a(5) 39

C. Foley has cited no valid authority for the proposition that the Liquidator was a receiver or trustee 40

IV—Section 3a(5) of the Bankruptcy Act is specific and need not be judicially enlarged 44

Conclusion 48

TABLE OF AUTHORITIES

Cases:

PAGE

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227 (1937) 16
Ambrose Matthews & Co., In re, 229 F. 309 (D.N.J. 1916), *aff'd*, 236 F. 539 (3d Cir. 1916) 10, 27, 29

Blum Bros. v. Girard Nat'l Bank, 248 Pa. 148, 93 A. 940 (1915) 41
Bonnie Classics, Inc., In re, 116 F.Supp. 646 (S.D.N.Y. 1953) 23, 24, 25, 26
Booth v. Clark, 58 U.S. (17 How.) 322 (1855) 20
Burrell, In re, 123 F. 414 (2d Cir. 1903) 34

Cook v. Tullis, 85 U.S. (18 Wall.) 332 (1874) 12, 44

District of Columbia v. Sweeney, 310 U.S. 631 (1940) 18

Electric Supply Co., In re, 175 F. 612 (S.D. Ga. 1912) 43
Empire Metallic Bedstead Co., In re, 98 F. 981 (2d Cir. 1899) 46

First National Bank v. Flershem, 290 U.S. 504 (1934) 38
Fish v. East, 114 F.2d 177 (10th Cir. 1940) 42

Gittings v. Morris, 156 Md. 565, 144 A. 836 (1929) 42
Globe Ins. Co. v. Cleveland Ins. Co., 10 Fed. Cas. 488 (No. 5486) (C.C.N.D. Ohio 1876) appeal dismissed, 98 U.S. 366 (1879) 29
Golden v. Zwickler, 394 U.S. 103 (1969) 15

Hall v. Beals, 396 U.S. 45 (1969) 15
Handy v. C.I.T. Corp., 291 Mass. 157, 197 N.E. 64 (1935) 23
Hannon v. Mechanics Bldg. & Loan Assn. of Spartanburg, 177 S.C. 153, 180 S.E. 873 (1935) 41
Hayden Plan Co. v. Wood, 97 Cal. App. 1, 275 P. 248 (1929) 42

PAGE

International Coal Min. Co., In re, 143 F. 665 (E.D. Pa. 1906) 42

Jennings Sewer Dist. of St. Louis County v. Pitcairn, 238 Mo. App. 704, 187 S.W. 2d 750 (1950) 41

Ledbetter v. Farmers Bank & Trust Co., 142 F.2d 147 (4th Cir. 1944) 10, 20
Lohf v. Casey, 330 F.Supp. 356 (D. Colo. 1971), *aff'd* 446 F.2d 618 (10th Cir. 1972) 9, 18

Maplecroft Mills v. Childs, 226 Fed. 415 (4th Cir. 1915) 12, 45
Marvin v. Brooks, 94 N.Y. 71 (1883) 41, 42
McMullin v. Keogh-Doyle Meat Co., Colo. 298, 42 P.2d 463 (1935) 42
Mills v. Green, 159 U.S. 651 (1895) 15

Rice v. Sioux City Cemetery, 349 U.S. 70 (1955) 9, 18
R. V. Smith Co., In re, 38 F.Supp. 57 (W.D. Okla. 1941) 27

Scheuer v. Smith & Montgomery Book & Stationery Co., 112 F. 407 (5th Cir. 1901) 34
St. Pierre v. United States, 319 U.S. 41 (1943) 15

Taylor v. Davis' Adm'x., 110 U.S. 330 (1884) 23

United States v. Kras, —— U.S. ——, 93 S.Ct. 631 (1973) 12, 47

Watts & Sachs, In re, 190 U.S. 1 (1903) 32
Wm. S. Butler & Co., In re, 207 F. 705 (1st Cir. 1913), *cert. denied*, 231 U.S. 752 (1913) 34

PAGE

Statutes:

Bankruptcy Act

Section 2a(21), 11 U.S.C. §11a(21) 11, 39
Section 3a(4), 11 U.S.C. §21a(4) ..... *passim*
Section 3a(5), 11 U.S.C. §21a(5) ..... *passim*
Section 19, 11 U.S.C. §42(1A) 6
Section 24c, 11 U.S.C. §47c 3
Section 39c, 11 U.S.C. §67c 7
Section 69d, 66 Stat. 426, 11 U.S.C. §109d 11, 39, 40
Section 311, 11 U.S.C. §711 ..... 7, 12, 47
Section 321, 11 U.S.C. §721 13
Section 325, 11 U.S.C. §725 ..... 7, 9, 13
Sections 336(4) and 337, 11 U.S.C. §§736(4) and 737 7
Section 367, 11 U.S.C. §767 14

Securities Investor Protection Act of 1970

Section 5(b)(1)(A), 15 U.S.C. §78eee(b)(1)(A) 17, 18
Section 5(a)(2), 15 U.S.C. §78eee(b)(2) 17
15 U.S.C. §§78aaa, *et seq.* 5, 9, 13, 16–17

Miscellaneous:

Colin, An Analysis of the 1926 Amendments to the Bankruptcy Act, 26 Colum. L. Rev. 789 (1926) 35
1 Collier, Bankruptcy ¶3.03 at 403 (14th Ed. 1972) 11, 44
1 Collier, Bankruptcy ¶3.501 at 495 (14th Ed. 1972) 35
Hearings on H.R. 5221 and H.R. 8119 Before the House Comm. on the Judiciary, 69th Cong., 1st Sess., ser. 4, at 17 (1926) 37
Hearings Pursuant to H.Res. 353 on Revision of the Bankruptcy Law Before the House Comm. on the Judiciary, 68th Cong., 2d Sess., ser. 51, at 38-39 (1925) 36

PAGE

High, A Treatise on the Law of Receivers, ch. 1, §1, at 2-3 (4th Ed. 1910) 20
H.R. Rep. No. 695, 69th Cong., 1st Sess. 4 (1926) 35
H.R. Rep. No. 877, 69th Cong., 1st Sess. 7 (1926) 10, 35
H.R. Rep. No. 1257, 69th Cong., 1st Sess. 8 (1926) 11, 36
H.R. Rep. No. 1409, 75th Cong., 1st Sess. 6 (1937) 38
H.R. Rep. No. 1613, 91st Cong., 2d Sess. 14 (Oct. 21, 1970) 18
H.R. Rep. No. 2320, 82d Cong., 2d Sess. 15 (1952) 11, 40
McLaughlin, Amendment of the Bankruptcy Act, 40 Harv. L. Rev. 341 (1927) 35–36
Note, "Acts of Bankruptcy" in Perspective, 67 Harv. L. Rev. 500 (1954) 44
Restatement of Trusts 2d, §§2 and 8 & Comment *a* (1959) 10, 23
Scott, The Law of Trusts, ch. 1, §8, at 78-79 (3rd Ed. 1967) 10, 23
S. Rep. No. 1916, 75th Cong., 3d Sess. 12 (1938) 11, 38
Treiman, Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law, 52 Harv. L. Rev. 189 (1938) 44

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1154

In the Matter
of
BLAIR & CO., INC.,

Debtor.

JOHN P. FOLEY, JR., J. P. FOLEY & CO., INC.
and ANITA SALISBURY,

Petitioners,

against

BLAIR & CO., INC. and PATRICK E. SCORESE, as Liquidator appointed by the New York Stock Exchange, Inc. for BLAIR & CO., INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS

Orders and Opinions in the Courts Below

The opinion of the United States Court of Appeals for the Second Circuit (the "Court of Appeals"), dated December 11, 1972, is reported at 471 F.2d 178 (2d Cir. 1972) (Pet. App. "A"* at 10).

* References in parentheses to "Pet. App." refer to Appendices "A", "B" or "C" annexed to the petition for certiorari herein and the pages thereof.

John P. Foley, Jr., J. P. Foley & Co., Inc. and Anita Salisbury (hereinafter collectively referred to as "Petitioners" or "Foley") filed a petition with this Court on February 21, 1973 for a writ of certiorari to the Court of Appeals. The Court granted Foley's petition on April 16, 1973.

The case at bar has its genesis in the filing by Foley of an involuntary petition in bankruptcy against Blair & Co., Inc. ("Blair") with the United States District Court for the Southern District of New York ("District Court") on September 29, 1970. The judgment of the Court of Appeals reversed an order of the District Court dated March 15, 1972 (Pet. App. "B" at 25) and directed the dismissal of the involuntary petition in bankruptcy on the ground that Foley had not sustained the burden of establishing the commission of an act of bankruptcy by Blair. The order of the District Court had affirmed a decision of a referee in bankruptcy. The referee found that the consensual appointment of an agent to liqudiate the property of Blair, who was not vested with title to such property and whose appointment was not judicially made or made pursuant to a statute, was the equivalent of the appointment of a "receiver" or "trustee" within the meaning of Section 3a(5) of the Bankruptcy Act (the "Act"), 11 U.S.C. §21a(5), and constituted the commission of an act of bankruptcy by Blair.

The majority opinion of the Court of Appeals, after an analysis of the legislative evolution of Section 3a(5) of the Act, concluded that a consensually appointed agent who would act on behalf of the corporation in the liquidation of its property, but who had no power to restrain or impede

creditors in the exercise of their rights, was not a "receiver" or "trustee," as those terms are used in said section of the Act.

Jurisdiction

Foley invokes the jurisdiction of this Court under Section 24c of the Bankruptcy Act, 11 U.S.C. §47c, although the brief of Petitioners does not so state.

Statute Involved

The instant appeal is concerned with the alleged commission of an act of bankruptcy under Section 3a of the Act, 11 U.S.C. §21a. Section 3a of the Act sets forth six acts of bankruptcy. The commission of one or more acts of bankruptcy by the alleged bankrupt must be established as a prerequisite to an adjudication in bankruptcy. In connection with this appeal, Foley relies solely upon Section 3a (5), the fifth act of bankruptcy, which provides, in relevant part, as follows:

> "Acts of bankruptcy by a person shall consist of his having * * * (5) while insolvent or unable to pay his debts as they mature, procured, permitted, or suffered voluntarily or involuntarily the appointment of a receiver or trustee to take charge of his property * * *."

Question Presented for Review

Is the consensual appointment of a liquidating agent, who is not vested with title to the debtor's property and whose appointment does not affect the rights of creditors, the commission of an act of bankruptcy under Section 3a(5) of the Act, 11 U.S.C. §21a(5)?

Statement of the Case

The relevant and salient facts pertaining to this case are as follows:

1. Prior to September 21, 1970, Blair was engaged in the general brokerage and commission business, maintaining its principal place of business at 20 Broad Street, New York, New York. It was a registered broker-dealer and a member of the New York Stock Exchange, Inc. (the "Exchange") as well as other national securities exchanges (9A, 10A*).

2. On or about April 3, 1970, Foley contributed to Blair a secured demand note collateralized by marketable securities in order to increase Blair's capital, allow it to be in capital compliance under the rules of the Exchange and continue its business (82A-95A). Foley's right to the return or withdrawal of the moneys and securities contributed to Blair was subordinated to the rights of all public customers and other creditors who had not also subordinated their rights and claims (Pet. App. "A" at 12).

3. In the early summer of 1970, Blair commenced a program of self-liquidation, which entailed the transfer of its customer accounts to other brokers or dealers and the delivery of securities as designated by customers. In order to expedite the satisfaction of public customers' claims and to provide customer assistance, if necessary, Blair entered into an agreement with the Exchange on September 21, 1970. That agreement provided, *inter alia*, that the Exchange

* Numbers in parentheses followed by "A" refer to pages of the joint appendix.

would have the right to appoint a "Liquidator" in the event that the Trustees of the Exchange's Special Trust Fund made a loan to or guaranteed any obligation of Blair (34A-65A).

4. The Exchange's Special Trust Fund was established in 1964 to (a) provide public customer assistance, where appropriate, in the case of a financially distressed member organization and thus alleviate the hardship which might otherwise be incurred by public customers if such member organization became involved in a bankruptcy proceeding; and to (b) avoid a loss of confidence on the part of public customers in the securities market (16A).*

5. On September 25, 1970, the Trustees of the Special Trust Fund made an initial advance to Blair (18A). Pursuant to the terms of the agreement dated September 21, 1970, the Exchange thereafter appointed Patrick E. Scorese as Liquidator for Blair (18A). Mr. Scorese was appointed for the purpose of assisting Blair's public customers through the use of advances from the Special Trust Fund and to implement the program of liquidation previously adopted by Blair's management (16A). The Liquidator was given authority and power by Blair's board of directors to act for and on behalf of Blair in connection with its assets and properties (48A-64A).

6. On September 29, 1970, Foley filed with the District Court an involuntary petition in bankruptcy against Blair (26A-31A), which asserted, *inter alia*, that the appointment of Mr. Scorese resulted in the commission of an act of bankruptcy by Blair.

---

* The function of the Special Trust Fund has been terminated by the enactment of the Securities Investor Protection Act of 1970, 15 U.S.C. §§78aaa, *et seq.*, which affords financial protection to customers of a financially distressed broker or dealer.

7. At the time of the filing of the involuntary petition in bankruptcy, Blair maintained approximately 28,000 public customer accounts and held more than $75,000,000 in securities, approximately $40,000,000 of which, including those of customers, were pledged with banks as collateral for loans approximating $30,000,000 (9A-10A).*

8. All advances from the Special Trust Fund to Blair ceased upon the filing of the involuntary petition in bankruptcy (Pet. App. "A" at 13).

9. Blair interposed an answer to the involuntary petition in bankruptcy on October 9, 1970, denying the material allegations thereof, and requesting a trial by jury pursuant to Section 19 of the Act, 11 U.S.C. §42(1A). Thereafter, on November 2, 1970, Blair moved in the bankruptcy court for summary judgment dismissing the petition and Foley cross-moved for summary judgment adjudging Blair a bankrupt (6A-149A).

10. By decision dated April 13, 1971, the bankruptcy court denied Blair's motion, granted Foley's cross-motion and held, in part, that Blair's consent to the appointment of Mr. Scorese as Liquidator constituted the commission of the fifth act of bankruptcy under Section 3 of the Act (219A-221A).

11. On April 15, 1971, Blair filed a petition for an arrangement under Chapter XI, Section 321 of the Act, 11 U.S.C. §721 (Pet. App. "A" at 13). By reason thereof, the order of the bankruptcy court, dated April 27, 1971, adjudging Blair a bankrupt (236A-237A), stayed all ordinary

* Subsequent to April 15, 1971 and pursuant to the arrangement proposed in the Chapter XI proceedings initiated by Blair, the valid claims of all public customers of Blair have been satisfied and the securities described above have been delivered to customers entitled thereto.

bankruptcy proceedings pursuant to Chapters I-VII of the Act, subject to the order of the referee assigned to the Blair Chapter XI proceedings.

12. On May 7, 1971, Blair and the Liquidator, pursuant to Section 39c of the Act, 11 U.S.C. §67c, filed a petition for review of the order of the bankruptcy court dated April 27, 1971 (231A-238A). On May 18, 1971, after notice to all creditors of Blair and a hearing before the bankruptcy court, the referee entered an order pursuant to Section 325 of the Act, 11 U.S.C. §725, staying ordinary bankruptcy proceedings under Chapters I-VII of the Act (Pet. App. "A" at 14). In accordance therewith, Blair and the Liquidator have proceeded with the prosecution of the Chapter XI proceedings.

13. On May 26, 1971, Blair filed with the District Court its proposed arrangement with its creditors pursuant to Chapter XI of the Act.

14. On September 27, 1971, the bankruptcy court found that the proposed arrangement had been accepted in writing by the requisite majority in number and amount of creditors in accordance with Section 336(4) and 337 of the Act, 11 U.S.C. §§736(4) and 737.

15. On or about September 24, 1971, Foley moved in the bankruptcy court to dismiss the Blair Chapter XI proceedings on the grounds that (a) the filing of the debtor's Chapter XI petition had allegedly not been properly authorized by its board of directors; (b) the debtor's proposed arrangement was allegedly "illegal, void and incapable of being confirmed"; (c) the debtor allegedly could not be rehabilitated; and (d) the debtor had allegedly failed to move for confirmation promptly.

16. By order dated March 15, 1972, the District Court affirmed the order of the bankruptcy court dated April 27, 1971, which had sustained the involuntary petition in bankruptcy and adjudged Blair a bankrupt (239A-241A).

17. On December 11, 1972, the Court of Appeals reversed the District Court's order of March 15, 1972 with instructions to direct the referee to vacate the order of adjudication and dismiss the involuntary petition in bankruptcy (244A-245A). In its opinion, the Court of Appeals found that the bankruptcy court and the District Court had "erred in concluding that Blair had committed the fifth act of bankruptcy" (Pet. App. "A" at 14).

18. By order dated February 16, 1973, the bankruptcy court denied Foley's motion to dismiss the Blair Chapter XI proceedings.

19. On March 19, 1973, pursuant to Section 39c of the Act, Foley filed a petition for review of the aforesaid order of the bankruptcy court.

20. By order dated June 12, 1973, the District Court denied Foley's petition for review, affirmed the bankruptcy court, finding the "grounds argued by Foley for dismissal [of the Blair Chapter XI proceedings] to be frivolous and without merit or substance."

Summary of Argument

I. A. The question on appeal is moot, for any decision by the Court will have no effect on the proceedings in the bankruptcy court or upon the rights of the parties. Blair has filed a petition for an arrangement under Chapter XI, Section 321 of the Act and is subject to the jurisdiction of the bankruptcy court pursuant thereto. The bankruptcy

court, pursuant to Section 325 of Chapter XI of the Act, has stayed the administration of the Blair estate in ordinary bankruptcy proceedings under Chapters I-VII. In addition, Foley's motion to dismiss the Blair arrangement proceedings has been denied and confirmation of the debtor's proposed arrangement is imminent. Upon confirmation, the debtor will be discharged and the case, including the involuntary ordinary bankruptcy proceeding, will be dismissed. A determination of the question presented herein will not have any effect on the Chapter XI proceedings. Foley thus asks the Court to render an opinion on a hypothetical set of facts, namely, the administration of the Blair estate in ordinary bankruptcy proceedings when such an administration has been stayed and will not be revived. Accordingly, there is no controversy between the parties of "sufficient immediacy and reality" to warrant the exercise of jurisdiction by this Court. *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969).

B. The enactment of the Securities Investor Protection Act of 1970, 15 U.S.C. §§78aaa, *et seq.*, renders academic the issue on appeal insofar as financially distressed stockbrokers, such as Blair, are concerned. It is undisputed that Blair was insolvent in September of 1970 and that it would have fallen under the purview of said statute but for the prospective nature of the legislation. *Lohf* v. *Casey*, 330 F.Supp. 356 (D. Colo. 1971), *aff'd*, 446 F.2d 618 (10th Cir. 1972). Thus, the Securities Investor Protection Act makes certain that the issue before the Court will not arise again. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955).

II. A. The Liquidator in the case on appeal is not a receiver for he was not appointed by any court or pursuant

to any statute. *Ledbetter* v. *Farmers Bank & Trust Co.*, 142 F.2d 147, 150 (4th Cir. 1944). Since a receiver is not, without more, an agent, so an agent with broad powers such as the Liquidator, is not, without more, a receiver. The Liquidator was also not a trustee, for he did not have title to the debtor's property. Scott, The Law of Trusts, ch. 1, §8, at 78-79 (3d ed. 1967); Restatement of Trusts 2d, §§2 and 8 & Comment *a* (1959). The instant case differs essentially from *In re Bonnie Classics, Inc.*, 116 F. Supp. 646 (S.D.N.Y. 1953), which dealt with statutory trustees who were vested with title to the debtor's assets, who acquired possession thereof and whose appointment affected the rights of creditors.

B. The Liquidator, unlike a receiver or trustee, could not restrain Blair's creditors. The rights of Blair's creditors were not affected by the appointment of the Liquidator and such creditors could have proceeded to judgment against Blair in a court of competent jurisdiction and were not relegated to a *pro rata* distribution of the debtor's assets in a statutory or equity proceeding. Blair's creditors were therefore not hindered, delayed or defrauded by the Liquidator's appointment. *In re Ambrose Matthews & Co.*, 229 F. 309 (D.N.J. 1916), *aff'd*, 236 F. 539 (3d Cir. 1916).

III. A. The legislative history and statutory context of Section 3a do not reveal a congressional intent to include an agent authorized to liquidate a debtor's property within the accepted meaning of "receiver" or "trustee". The 1903, 1926 and 1938 amendments to Section 3a were primarily concerned with the statutory definition of "insolvency". See, *e.g.*, H.R. Rep. No. 877, 69th Cong., 1st Sess. 7 (1926). Until 1926, the statute required the appointment

of a receiver or trustee to be "under the laws of a State, or a Territory, or of the United States". This language was deleted in 1926 only because it was surplusage. The Senate bill, S. 1039, had retained the deleted language, 67 Cong. Rec. 6800 (1926), but, in conference, the words were subsequently stricken, the House Managers stating that the "difference consists merely in phraseology". H.R. Rep. No. 1257, 69th Cong., 1st Sess. 8 (1926). Accordingly, the amendment did not change the substantive law with respect to the definition of a receiver or trustee in the context of the statute. The 1938 amendment was adopted for the purpose of including both the bankruptcy and equity definitions of insolvency, thereby expanding the breadth of Section 3a(5) in order to reach "the widely prevalent abuse of collusive equity receiverships", formal court proceedings in which creditors' rights were being impaired. S. Rep. No. 1916, 75th Cong., 3d Sess. 12 (1938).

B. A comparison of Section 3a(5) with Sections 2a(21) and 69d shows that when Congress wanted to include a liquidating agent within the coverage of the Act, it considered it necessary to say so and knew how to do it. Section 2a(21) was added in 1938, 52 Stat. 844, the same time as the most recent amendment to Section 3a(5), and specifically refers to an agent authorized to liquidate a debtor's property. Section 69d, amended in 1952, also specifically refers to an agent authorized to liquidate a debtor's property, 66 Stat. 426, and was amended at that time for the express purpose of including such an agent within its coverage. H.R. Rep. No. 2320, 82d Cong., 2d Sess. 15 (1952).

IV. A. Congress has made a policy determination that an insolvent debtor cannot be subjected to involuntary bankruptcy "unless he has done * * * certain acts * * * concern-

ing his property" which prejudice the rights of his creditors. 1 Collier, Bankruptcy ¶3.03 at 403 (14th Ed. 1972). The Act does not prevent an insolvent debtor from dealing with his property, so long as he does not defraud or delay his creditors or prefer any one creditor over another creditor of the same class and does not impair the value of his estate. *Cook* v. *Tullis*, 85 U.S. (18 Wall.) 332, 340 (1874).

B. The Act should not be enlarged by judicial action in order to expand the acts of bankruptcy to include an event clearly excluded by Congress. *Maplecroft Mills* v. *Childs*, 226 F. 415, 419 (4th Cir. 1915). Bankruptcy "is not the only method available to a debtor for the adjustment of his legal relationship with his creditors * * *." *United States* v. *Kras*, —— U.S. ——, 93 S.Ct. 631, 638 (1973). Blair is in any event subject to the "exclusive jurisdiction" of the bankruptcy court by virtue of its pending arrangement proceedings. Section 311 of the Act, 11 U.S.C. §711. In construing Section 3a(5), the court below properly construed what Congress enacted and correctly interpreted the statute's legislative history.

ARGUMENT

I

The question presented is moot and the writ of certiorari should be dismissed.

The case before the Court is a wholly academic matter, for a resolution of the question presented can have no impact upon the proceedings under the Act involving Blair or the other litigants in this Court. Blair is presently subject to proceedings under Chapter XI of the Act. Whether or not Blair is adjudged a bankrupt under Section 3a(5) of the Act is irrelevant to the confirmation of its proposed

arrangement and the discharge granted thereby. Further, the adoption of the Securities Investor Protection Act of 1970, 15 U.S.C. §§78aaa *et seq.*, renders the issue presented herein moot with respect to financially distressed brokers or dealers who maintain accounts for public customers. Thus, Foley asks the Court to render an opinion upon an academic question.

A. The ordinary bankruptcy proceedings affecting Blair have been stayed and Blair's assets are being administered in accordance with the provisions of Chapter XI of the Bankruptcy Act.

Blair filed its petition for an arrangement under Section 321 of the Act. A Chapter XI petition filed pursuant to Section 321, however, does not act as a stay of adjudication or of the administration of a debtor's estate in ordinary bankruptcy proceedings under Chapters I-VII of the Act. Section 325 of the Act, 11 U.S.C. §725. Section 325 further provides that the court may, "upon application of the debtor and upon notice to all parties in interest, * * * grant a stay of adjudication or of the administration of the estate * * *." Subsequent to the filing of its Chapter XI petition, Blair promptly applied for the issuance of such a stay under Section 325. Blair served more than 28,000 notices of the application and hearing to be held in connection therewith upon all creditors and parties in interest. After a hearing before the bankruptcy court on May 12, 1971, Blair's application for a stay of administration of the estate in ordinary bankruptcy proceedings under Chapters I-VII was granted in an order dated May 18, 1971.

Thereafter, Blair filed its proposed arrangement which, in essence, provided for the satisfaction of all valid claims

of customers and the 25% cash payment of all allowed claims of general unsecured creditors. At a hearing held before the bankruptcy court on September 27, 1971, the court found that the creditors of Blair had accepted the proposed arrangement by the requisite majority in number and amount of allowed claims.

Confirmation of the arrangement proposed by Blair is imminent. The provisions of the arrangement have been partially consummated. The valid claims of Blair customers have been satisfied and securities having a market value of millions of dollars have been delivered to customers pursuant to orders of the bankruptcy court. Until recently, confirmation of the arrangement had been deferred because of the technical impediment represented by the Foley motion to dismiss the Blair arrangement proceedings. This impediment was removed by the order of the bankruptcy court denying Foley's motion and the affirmance of that order by the District Court on June 12, 1973. The Chapter XI proceedings will therefore be concluded within a short period of time.

Confirmation of Blair's arrangement will be binding upon all creditors in accordance with Section 367 of the Act, 11 U.S.C. §767. Upon confirmation, the case, including the suspended ordinary bankruptcy proceedings initiated by Foley, will be concluded and dismissed. Thus, the issue of whether or not Blair committed an act of bankruptcy under Section 3a(5) of the Act is of no significance. Indeed, the issue has been mooted by Blair's election to continue the prosecution of the Chapter XI proceedings and remain subject to the jurisdiction of the bankruptcy court and the provisions of the Act.

This Court has consistently held that it will not decide cases in which there is no controversy between the parties of "sufficient immediacy and reality" and where such decisions would merely resolve academic questions. *Golden* v. *Zwickler*, 394 U.S. 103, 109 (1969); *Hall* v. *Beals*, 396 U.S. 45 (1969); *St. Pierre* v. *United States*, 319 U.S. 41 (1943). Thus, in *Hall* v. *Beals*, *supra*, the Court dismissed the case before it as moot, reasoning that an amendment to the statute in question resulted in the matter's losing "its character as a present controversy of the kind that must exist if [the Court is] to avoid advisory opinions on abstract opinions of law." 396 U.S. at 481. The Court expressly relied upon its previous holding in *Mills* v. *Green*, 159 U.S. 651 (1895), where it was held that:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, * * * an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence." 159 U.S. at 653.

A reversal of the judgment of the Court of Appeals herein would be of no effect in the present proceedings involving Blair and would not affect the rights of Foley. Petitioners, subordinated creditors of Blair, in protecting their rights, may utilize the same provisions of the Act as would be available if the ordinary bankruptcy proceed-

ings had not been stayed. Therefore, it is submitted that the question presented is not rooted in reality nor does it require resolution by this Court.

As stated by this Court in *Aetna Life Insurance Co.* v. *Haworth,* 300 U.S. 227 (1937):

> "A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot * * *. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests * * *. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." [citations omitted]. 300 U.S. at 240, 241.

Applying the foregoing reasoning to the case on appeal, the decision sought by Petitioners from this Court would merely relate to a hypothetical state of facts, namely, the administration of the Blair estate in ordinary bankruptcy proceedings under Chapters I-VII of the Act. In view of the posture of the Chapter XI proceedings, there will be no administration of Blair's estate under Chapters I-VII. Accordingly, Foley has not presented a justiciable controversy to be decided by the Court.

B. The enactment of the Securities Investor Protection Act of 1970 also renders academic the issue on appeal.

Petitioners state that there is a "public interest" in the Court's interpretation of Section 3a(5) of the Act (Petitioners' Brief at 23). Petitioners fail to make any reference to the Securities Investor Protection Act of 1970, 15

U.S.C. §§78aaa, *et seq.* ("SIPA"). Nevertheless, they have never disputed the fact that SIPA effectively resolves for the future the question presented herein insofar as stockbrokers are concerned.

The financial collapse of a broker or dealer such as Blair, since January 1, 1971, will subject it to liquidation proceedings pursuant to SIPA under the supervision of the Securities Investor Protection Corporation ("SIPC"), a nonprofit membership corporation established by SIPA. Section 5(b)(1)(A) of SIPA, 15 U.S.C. §78eee(b)(1)(A), expressly provides that, upon application of SIPC, a United States District Court may determine that customers of a broker-dealer are entitled to the benefits of the Securities Investor Protection Act if the broker-dealer:

> "(i) is insolvent within the meaning of Section 1(19) of the Bankruptcy Act, or is unable to meet its obligations as they mature, or (ii) has committed an act of bankruptcy within the meaning of Section 3 of the Bankruptcy Act, or (iii) is the subject of a proceeding pending in any court or before any agency of the United States or any State in which a receiver, trustee, or liquidator for such member has been appointed, or (iv) is not in compliance with applicable requirements under the 1934 Act or rules or regulations of the Commission or any self-regulatory organization with respect to financial responsibility or hypothecation of customers' securities, or (v) is unable to make such computations as may be necessary to establish compliance with such financial responsibility or hypothecation rules or regulations."

The filing by SIPC of an application pursuant to Section 5(a)(2) of SIPA, 15 U.S.C. §78eee(b)(2), vests the court with exclusive jurisdiction of the broker or dealer and its

property wherever located and supersedes any pending bankruptcy proceedings, among others. Section 5(b)(2) of SIPA, 15 U.S.C. §78eee(b)(2). Blair was insolvent within four months of the filing of the involuntary petition in bankruptcy herein. Accordingly, there is no question that Blair falls within the terms of the foregoing excerpt and that the benefits of SIPA would have been available to Blair's customers if SIPA were not prospective. See *Lohf* v. *Casey*, 330 F. Supp. 356 (D. Colo. 1971), *aff'd*, 446 F. 2d 618 (10th Cir. 1972); H. R. Rep. No. 1613, 91st Cong., 2d Sess. 14 (Oct. 21, 1970). Because of the foregoing, the case on appeal may be properly characterized as *sui generis*. A similar case will not arise again in the future. Consequently, a decision by this Court in this particular case would only resolve an abstract principle of law and not a real controversy.

In *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955), this Court held that when an issue no longer appears to be of substantial importance, a writ of certiorari should be dismissed as improvidently granted. There, the Court dismissed a writ of certiorari after it was clear that a recently enacted statute would assure that the issue could never arise again, reasoning as follows:

> "A federal question raised by a petitioner may be of substance in the sense that abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants." 349 U.S. at 74.

See also, *District of Columbia* v. *Sweeney*, 310 U.S. 631 (1940). The question presented to the Court is thus moot and of mere historical interest. Accordingly, the writ of certiorari should be dismissed.

II

A liquidating agent is not a "receiver" or "trustee" within the meaning of Section 3a(5) of the Bankruptcy Act and his appointment does not affect the rights of creditors.

Foley's conclusory arguments that the Liquidator had at least as much power as a receiver or trustee (Petitioners' Brief at 13) are without foundation in fact. Significantly, Foley avoids any discussion of the legal powers of a receiver or trustee. Foley's analysis of the Liquidator's powers merely focuses upon such powers in the abstract, with no consideration of the rights of Blair's creditors. Any valid analysis of the Liquidator's powers in the case on appeal, however, must take into consideration whether or not the Liquidator's appointment actually prejudiced the rights of Blair's creditors, as would be the case with the appointment of a receiver or trustee or the commission of any other act of bankruptcy under Section 3a of the Act.

A. The Liquidator is not a receiver or trustee.

The opinion of the Court of Appeals analyzed closely the legal meaning and significance of the terms "receiver" and "trustee" and found, *inter alia*, that the Liquidator in the case on appeal did not meet the usual requirements "essential to the status of a receiver, namely, appointment by a court" (Pet. App. "A" at 15). While Petitioners cavalierly disregard such a distinction, they do not dispute that the Liquidator was appointed pursuant to an agreement and that he was not appointed by a court or

pursuant to a statute. Petitioners further ignore the authorities and decisions, including those of this Court, which have described a receiver as follows:

> "A receiver is an indifferent person between parties, *appointed by the court* to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it. [Citations omitted.] *He is an officer of the court*; his appointment is provisional. * * * The money in his hands is in *custodia legis* for whoever can make out a title to it. [Citations omitted.] *It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as conferred upon him by the order of his appointment and the course and practice of the court.*" [Emphasis supplied.]

Booth v. *Clark*, 58 U.S. (17 How.) 322, 331 (1855); *accord*, High, A Treatise on the Law of Receivers, ch. 1, §1, at 2-3 (4th ed. 1910). The foregoing substantiates the settled principle that a receiver is either court appointed or appointed pursuant to statute. Foley's counter-argument, based upon the inability "to locate" a statute specifically stating the same, is facetious (Petitioners' Brief at 16). It demonstrates the tenuousness of the instant appeal. Indeed, Foley's statement that a liquidating agent "would seem" to fall within the coverage of the statute underscores the weakness of Foley's argument.

Petitioners disregard and do not refute the established principle that a receiver "is the agent only of the court appointing him." *Ledbetter* v. *Farmers Bank & Trust Co.*, 142 F. 2d 147, 150 (4th Cir. 1944). In the *Ledbetter* case,

supra, the plaintiffs contended that a receiver appointed by a state court in a mortgage foreclosure proceeding acted as the agent and representative of the mortgagees in wrongfully dealing with the receivership property. Affirming the lower court's dismissal of the complaint, the Court of Appeals for the Fourth Circuit held that the receiver was not the agent of the mortgagees, but was the agent only of the court which had appointed him, reasoning as follows:

> "*It is well recognized that a receiver is the agent only of the court appointing him; he represents the court rather than the parties. He is custodian of property which is under the control of the court.* See 23 R.C.L.—Receivers §2, p. 7. The appointment of a receiver is a judicial act. It is not a matter of positive right, but rests in the sound legal discretion of the appointing judge. Suggestions as to the person to be appointed as receiver do not have the legal effect of making the receiver the agent of the party making the suggestion. [Citations omitted.] [The court then quoted this Court's definition of 'receiver' quoted above in *Booth* v. *Clark, supra*.] Though a receiver appointed by the court acts for all parties interested, he is not the agent of the parties in the sense that each or any of the parties is responsible for his acts. * * *" 142 F. 2d at 150. [Emphasis supplied.]

Thus, the Court of Appeals below correctly reasoned that, since a receiver is not, without more, an agent, so an agent with broad powers such as the Liquidator, is not, without more, a receiver (Pet. App. "A" at 16).

Without citing any authority whatsoever, Foley argues that the established "prerequisite of judicial appointment should be disregarded completely * * *" (Petitioners' Brief at 17). No sound reason is advanced why the

authorities and precedent relied upon by the Court of Appeals should be disregarded even though Foley concedes that the Liquidator was not court-appointed and, thus, cannot be deemed an officer of any court. As the Court of Appeals noted, the Liquidator was expressly described as "the true and lawful attorney and agent of and for [Blair]" by the terms of the power of attorney executed on September 21, 1970 (Pet. App. "A" at 13). He is and was the agent of the corporation. His appointment did not change the status of Blair or affect its creditors or stockholders.

In an attempt to show that the Liquidator is a receiver or trustee, Petitioners argue that the Liquidator never acted on behalf of Blair or its board of directors "as an agent normally would" (Petitioners' Brief at 9). To support this factually incorrect premise, they state that "all but one" of Blair's directors "resigned upon [the Liquidator's] appointment. * * *" (Petitioners' Brief at 9). Significantly, Petitioners do not and cannot support this contention with any facts, either in the record or elsewhere. In fact, the statement of affairs filed by Blair with the District Court in accordance with Section 324 of the Act states under oath that, as of September 29, 1970, the date upon which the involuntary petition in bankruptcy was filed herein, and four days after the appointment of the Liquidator, Blair had a total of eight directors. The debtor's statement of affairs was further supported by the examination of an officer of the debtor on September 15, 1971 before the referee in bankruptcy under Section 7a(10) of the Act.

Petitioners emphasize that the Liquidator was empowered to sell certain of Blair's assets, but disregard the fact

that Blair retained title to all of its property. The Liquidator did not acquire title to Blair's property, and could not transfer title thereto without the consent of Blair. By reason of his lack of title to the property of Blair, the Liquidator lacked an element essential to the normal concept of trusteeship (Pet. App. "A" at 16).

> "An agent does not ordinarily have title to the property of the principal, although he may be entrusted with possession and although he may have power to pass title; *but a trustee has title to the trust property.*" [Emphasis supplied.]

Scott, The Law of Trusts, ch. 1, §8, at 78-79 (3rd ed. 1967); see *Handy* v. *C.I.T. Corp.*, 291 Mass. 157, 197 N.E. 64 (1935); Restatement of Trusts 2d, §§2 and 8 & Comment *a* (1959).

This Court has also stated that

> "[a] trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another." *Taylor* v. *Davis' Adm'x.*, 110 U.S. 330, 334 (1884).

Further, the Liquidator, as Blair's agent, could subject Blair to liability for his acts, whereas a trustee would ordinarily not have such power. Scott, The Law of Trusts, ch. 1, §8, at 74 (3rd ed. 1967).

Foley has not, and indeed cannot, point to any document which vested the Liquidator with title to or even possession of the property of Blair. Accordingly, Foley's heavy reliance upon *In re Bonnie Classics Inc.*, 116 F. Supp.

646 (S.D.N.Y. 1953) is misplaced. The *Bonnie Classics* decision is distinguishable from the instant appeal. In that case, the trustees, who had title to the debtor's assets, were appointed pursuant to a statute of New York State. The court stated the issue in that case to be as follows:

> "Does the filing of a certificate of dissolution of a corporation, *pursuant to §105 of the New York Stock Corporation Law*, when the corporation is insolvent, constitute an act of bankruptcy under §3, sub. a(5) of the Bankruptcy Act, 11 U.S.C.A. §21, sub. a(5)?" 116 F. Supp. at 646, 647. [Emphasis supplied.]

Bonnie Classics thus presented a case of trustees created by statute, who therefore fell within the established and accepted characterization of "trustee" set forth in Section 3a(5) of the Act. In contrast to *Bonnie Classics*, it is uncontroverted that the Liquidator was not appointed pursuant to any statute and that he was never vested with title to any of the debtor's assets.

In its articulate and reasoned opinion, the district court in *Bonnie Classics* discussed the nature of the duties imposed upon the directors of a corporation after the filing of a certificate for voluntary dissolution under §105(7) of the former New York Stock Corporation Law. Noting that a director of a corporation is a fiduciary, whether the corporation is solvent or insolvent, the court explained that the filing of a certificate for the voluntary dissolution of a corporation creates significant changes in both the status and the power of the corporation's directors.

> "The statute in express terms refers to them as 'trustees'. They become, as the New York authorities variously refer to them, 'trustees in liquidation', 'trustees

> of the dissolved corporation's assets', 'trustees of its assets' or 'trustees for the benefit of creditors of the corporation'. *In the instance of a corporation not in dissolution, the legal title to all its assets is in the corporation. In the case of a corporation in dissolution, the New York courts have ruled that the legal title to its property was vested in the directors as trustees for creditors and stockholders. Under this conception, it has been held that there is no property of the corporation against which creditors may proceed to enforce judgment obtained against the corporation and they are relegated to pro rata distribution of assets in the dissolution proceedings.*" 116 F. Supp. at 647, 648. [Emphasis supplied; citations omitted.]

Clearly, the court in *Bonnie Classics* relied heavily upon the transfer of title to the corporation's assets to the directors of the corporation, beyond the reach of creditors, with the result that under state law, the directors were "trustees" within the meaning of Section 3a(5) of the Act.

In contrast to the *Bonnie Classics* case, *supra*, Foley, however, is unable to bring the case on appeal within the rationale of *Bonnie Classics*. He is unable to cite any provision in the agreement of September 21, 1970 (34A-65A) which conveys to the Liquidator title to the assets of Blair or vests him with any of the other distinguishing powers of a trustee. Foley also disregards the provision of the liquidation agreement of September 21, 1970, which provides for the termination of the Liquidator's appointment at the option of Blair or its stockholders (44A-45A).

Foley ignores the essence of the *Bonnie Classics* case, as distinguished from the case at bar. Unlike the corporation which has filed a certificate for voluntary dissolu-

tion in New York, described in *Bonnie Classics, supra*, subsequent to the Liquidator's appointment, creditors of Blair could have proceeded against the property and assets of the debtor to enforce any judgment obtained against that corporation. Blair's creditors retained all rights to prosecute their claims and proceed against Blair without regard to the appointment of the liquidating agent. Unlike creditors in the New York dissolution proceedings described in *Bonnie Classics*, creditors of Blair were not "relegated to *pro rata* distribution of assets in the dissolution proceedings" because of the appointment of the Liquidator.

Foley erroneously places great emphasis upon the following excerpt from *Bonnie Classics, supra*, quoted in the dissenting opinion in the Court of Appeals:

> "The method adopted to effect the *transfer* is immaterial. * * * Any action by one who is insolvent which effectively causes the transfer of his property to another for final liquidation purposes appoints the transferee a 'trustee to take charge of his property' under §3, sub. a(5)." 116 Supp. at 648. [Emphasis supplied.]

The key word in the foregoing excerpt is "transfer." The court in *Bonnie Classics* was focusing upon a "transfer" of the debtor's property. A transfer of title and possession of the debtor corporation's property had been effected in *Bonnie Classics*. No such transfer of Blair's assets took place when the Liquidator was appointed. Blair has always retained title to and possession of its assets.

Foley has cited no provision in the liquidation agreement of September 21, 1970 (34A-65A) which gives the

Liquidator exclusive possession or control of the debtor's property, as is argued (Petitioners' Brief at 13). Further, the liquidation agreement is devoid of any provision which divests Blair's officers and directors of possession or control of the corporation's assets. In fact, the officers of Blair continue to be involved in its operations with the Liquidator. The distinctions between Blair and *Bonnie Classics* were even recognized by Circuit Judge Timbers, in his dissenting opinion below (Pet. App. "A" at 22).

The Court of Appeals rejected as unpersuasive the decision in *In re R. V. Smith Co.*, 38 F. Supp. 57 (W.D. Okla. 1941) (Pet. App. "A" at 17). Relying upon a statement of this Court taken out of context (Petitioners' Brief at 22), and no more, Foley contends that the *Smith* case, *supra*, is controlling in the case on appeal. The *Smith* case dealt only obliquely with the issue now before this Court. There, the petitioning creditors alleged that the debtor's consent to the appointment of "liquidating trustees" constituted an assignment for the benefit of creditors, the fourth act of bankruptcy. Section 3a(4) of the Act, 11 U.S.C. §21a(4). The court noted initially it was "not at all satisfied that, even under the Act and under the construction that has been placed on similar acts by Federal Courts, the instruments executed * * * did not constitute an assignment for the benefit of creditors," although title was not expressly conveyed to the liquidating trustees. 38 F. Supp. at 62. But see *In re Ambrose Matthews & Co.*, 229 F. 309 (D.N.J. 1916), *aff'd*, 236 F. 539 (3d Cir. 1916). While the court in the *Smith* case merely stated that the alleged bankrupt had committed the fifth act of bankruptcy, it did not indicate whether or not any defense was inter-

posed to the alleged commission of such act. Moreover, the court gave no consideration whatsoever to the derivation of Section 3a(5) or the legislative history and purpose underlying the adoption of that section. Accordingly, it is submitted that the Court of Appeals properly rejected the *Smith* case as unpersuasive.

B. The Liquidator could not affect the rights of Blair's creditors.

The true significance of the Liquidator's appointment upon the creditors of Blair, if any, can best be demonstrated by a comparison between the consequences to creditors after his appointment and the consequences to creditors after the fourth and fifth acts of bankruptcy have been committed by a debtor. The fourth act of bankruptcy, which entails the debtor's making a general assignment for the benefit of his creditors, and the fifth act of bankruptcy, which entails a receivership or trusteeship, have the effect of preventing creditors from pursuing their ordinary remedies against the debtor. When either the fourth or fifth acts of bankruptcy are committed, creditors are forced to deal with the debtor's assignee, receiver or trustee, and must share in the debtor's assets on a *pro rata* basis. In contrast, after the appointment of the Liquidator, Blair's creditors were not adversely affected.* Creditors could proceed with the prosecution of actions against Blair and were not relegated to any particular forum as a court of exclusive jurisdiction. The appointment of the

* The appointment of the Liquidator had the converse effect, as it carried with it the anticipated infusion of millions of dollars from the Special Trust Fund of the New York Stock Exchange for customer assistance. To date, the Fund has advanced $20.4 million in connection with claims of customers of Blair.

Liquidator did not change the posture of Blair and its creditors or their respective rights.

By adoption of Section 3 of the Act, Congress determined that creditors of a debtor may not be bound by that debtor's election to make an assignment for the benefit of creditors or his subjecting himself to a receivership or trusteeship other than pursuant to the Bankruptcy Act. By virtue of Section 3, creditors could compel involuntary proceedings under the Act, provided the debtor committed an act of bankruptcy. *Globe Ins. Co.* v. *Cleveland Ins. Co.*, 10 Fed. Cas. 488, 492 (No. 5486) (C.C.N.D. Ohio 1876), *appeal dismissed*, 98 U.S. 366 (1879). In the case on appeal, however, the appointment of the Liquidator did not deprive Blair's creditors, including Foley, of such a right. Consequently, if Blair were a party to the heinous acts implied by Foley, Foley would be in a position to take appropriate action. An appointment of an agent to liquidate a debtor's property is thus not a "broad highway for fraud and evasion of the rights of creditors in the liquidation of insolvent companies," as stated by Foley (Petitioners' Brief at 23).

Significantly, Foley fails to distinguish *In re Ambrose Matthews & Co.*, 229 F. 309 (D.N.J. 1916), *aff'd*, 236 F. 539 (3d Cir. 1916), cited by the Court of Appeals (Pet. App. "A" at 17). There, the court held that a corporate debtor which merely grants a power of attorney for the purpose of winding up its affairs has not made an assignment for the benefit of its creditors and has not therefore committed the fourth act of bankruptcy. *Ambrose Matthews* presented a factual situation strikingly similar to the instant

case. The reasoning of that case should be dispositive of the case on appeal.

> "It is necessary primarily, therefore, to construe this instrument [i.e. the power of attorney] and to ascertain its legal effect as respects the property of the alleged bankrupt. It does not contain any words of conveyance, assignment or transfer. It merely appoints two persons as 'agents, attorneys and trustees' for the stockholders, directors and corporation 'for the purpose of winding up the affairs' of the corporation. It empowers them to collect the corporation's outstanding accounts, to pay its debts, to prosecute and defend suits for and against it, to convey and dispose of its property, and after payment of its debts to divide its assets among the stockholders; also, to prepare the necessary papers for the dissolution of the corporation immediately after its accounts have been settled; and, generally, it sought in terms to confer upon them all of the powers and to impose all of the liabilities of a board of directors in winding up the affairs of a corporation upon dissolution. It seems entirely clear that it conferred no title whatever to any of the corporation's property upon the trustees. Its effect was merely to clothe the trustees with certain powers regarding the disposition of the corporation's assets and the distribution of the same among its creditors and stockholders. Nor can I find that there was any intent on the part of the alleged bankrupt to confer title upon the trustees. Each of the latter were attorneys at law, and the purpose of the instrument was that they, who were presumably better qualified, rather than the directors, should wind up the affairs of the corporation. *As the instrument brought about no change in the title to the property, either absolute or conditional, nothing was conveyed or transferred by it, and it could not hinder, delay or*

defraud creditors, because any creditor could proceed to satisfy his claim from the corporation's property to the same extent as though the instrument did not exist." 229 F. at 310. [Emphasis supplied.]

The foregoing is directly applicable to the instant case, for, if the debtor's granting of a power of attorney does not constitute the fourth act of bankruptcy, then it should not constitute the fifth act, provided that the rights of creditors are in no way affected thereby. The court below properly recognized the significance of this consideration when it rejected Foley's contentions (Pet. App. "A" at 20, 21).

Consistent with the authorities cited herein, the distinctions between the Liquidator in the case on appeal and a "receiver" or "trustee" within the meaning of Section 3a(5) of the Act are graphically demonstrated in the following two tables:

TABLE 1

INCIDENTS OF LEGAL STATUS

	Liquidator	*Receiver*	*Trustee*
Title to Debtor's Assets	No	No	Yes
Statutory Appointment	No	Yes	Sometimes
Court Appointment	No	Yes	Sometimes
Agency Relationship with Debtor	Yes	No	No

TABLE 2

ABILITY TO AFFECT RIGHTS OF CREDITORS

	Liquidator	*Receiver*	*Trustee*
Power to Stay Creditors from Proceeding Against Assets of Debtor in Any Court	No	Yes	Yes
Power to Force Creditors to Share in *Pro Rata* Distribution of Debtor's Assets	No	Yes	Yes

The Court of Appeals recognized and clearly stated how the Liquidator's powers differed essentially from those of a receiver or trustee within the context of Section 3a(5) of the Act. Foley, on the other hand, makes constant reference to the powers of a receiver or trustee, but makes no effort to define these powers in their statutory context. In contrast to Foley's reasoning, the rationale of the Court of Appeals is legally and logically well founded and should be affirmed.

III

The legislative history and statutory context of Section 3a(5) of the Bankruptcy Act demonstrate that a liquidating agent is not a "receiver" or "trustee."

The legislative history and statutory context of Section 3a(5) of the Act do not reveal a congressional intent to include a liquidating agent within the accepted meaning of "receiver" or "trustee." No reference is made to an agent authorized to liquidate property of an alleged bankrupt in any of the relevant legislative history. Foley fails to cite any such reference.

Foley's distorted interpretation of the pertinent legislative history is predicated exclusively on the self-constructed premise or "rule as to paramount and exclusive jurisdiction of liquidations of insolvent companies under the Bankruptcy Act * * *" (Petitioners' Brief at 4). The only authority cited by Foley for this erroneous premise is this Court's decision in *In re Watts & Sachs*, 190 U.S. 1 (1903). It was held in that case, however, that "the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations apply-

ing to be wound up *under state statutes.*" [Emphasis supplied.] The Court did not state that bankruptcy proceedings constituted the exclusive means for the liquidation and winding up of the affairs of an insolvent debtor or that such proceedings could be imposed in the absence of the commission of an act of bankruptcy. The crucial issue in the case at bar is not the supremacy of the Bankruptcy Act, but when the provisions of the Act may be imposed upon a debtor. Foley failed to establish that Blair committed an act of bankruptcy within the context of Section 3 of the Act. To cure that failure, Foley now requests that the Court judicially enlarge the statute.

Unlike the case on appeal, the Court in *Watts, supra,* was construing the predecessor to Section 3a(5), which provided that an act of bankruptcy would exist if a person "being insolvent, applied for a receiver or trustee for his property or because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory or of the United States." The receiver in that case had been appointed by a state court prior to the commencement of the bankruptcy proceedings. As a result, the case is of no significance herein, as the Liquidator of Blair was not appointed pursuant to statute or any judicial proceeding.

A. The Legislative History of Section 3a(5)

1. The Bankruptcy Act of 1898 and Its 1903 Amendment

The Court of Appeals noted that the present Section 3a(5) has its derivation in the Bankruptcy Act of 1898, ch. 541, §1 *et seq.*, 30 Stat. 545. In that statute, the appointment of a receiver or a trustee was not deemed to

be an act of bankruptcy, but several courts nevertheless treated such an appointment as the equivalent to the general assignment for the benefit of creditors, thereby constituting the commission of the fourth act of bankruptcy. *Scheuer* v. *Smith & Montgomery Book & Stationery Co.*, 112 F. 407 (5th Cir. 1901). The majority of courts, however, ruled otherwise. *In re Burrell*, 123 F. 414 (2d Cir. 1903).

In order to reconcile these conflicting decisions, Congress amended the fourth act of bankruptcy in 1903 to provide that an act of bankruptcy was committed if the alleged bankrupt "* * * made a general assignment for the benefit of creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency, a receiver or trustee had been put in charge of his property *under the laws of a State, or a Territory, or of the United States.*" Act of February 5, 1903, 32 Stat. 797. [Emphasis supplied.] Thus, the 1903 statutory amendment created an additional act of bankruptcy intended to cover those cases where a receiver or trustee was appointed pursuant to a statute or judicial proceeding.

While the 1903 amendment was intended by Congress to expand the coverage of Section 3a(4), a number of courts limited the effect of the amendment by construing the term "insolvency" in accordance with the narrow "bankruptcy" definition set forth in Section 1(19) of the Act. See, *e.g.*, *In re Wm. S. Butler & Co.*, 207 F. 705 (1st Cir. 1913), *cert. denied*, 231 U.S. 752 (1913). These narrow interpretations of the statute led to an additional amendment to Section 3a in 1926, thereby creating a fifth act of bankruptcy.

2. *The 1926 Amendment*

The Court of Appeals noted that the 1926 amendment to Section 3a was merely intended to clarify the term "insolvency" contained therein and its application (Pet. App. "A" at 18). First, Congress deleted the reference to receivers and trustees in the fourth act of bankruptcy and established a new act, Section 3a(5), which expressly referred to receivers and trustees. The new provision provided that an act of bankruptcy would be committed by the debtor if, "* * * while insolvent, a receiver or trustee had been appointed, or put in charge of his property." 44 Stat. 663. The amendment was made for the purpose of removing the distinction between voluntary and involuntary receivership proceedings, but also for the purpose of eliminating any inquiry into the causation of such proceedings. 1 Collier, Bankruptcy, ¶3.501 at 495 (14th Ed. 1972). Indeed, the House Committee on the Judiciary analyzed the amendment to Section 3 of the Act, stating the reasons for the change as follows:

> "Under judicial interpretation, the existing provision of the law has been held to mean that insolvency must actually be alleged in a petition for the appointment of a receiver, and a receiver must have been appointed because of insolvency, in order to become an act of bankruptcy. Under the amendment the appointment of a receiver for a debtor who is in fact insolvent, is in itself an act of bankruptcy, even though such insolvency was not directly alleged in the petition asking for a receiver."

H.R. Rep. No. 877, 69th Cong., 1st Sess. 7 (1926); see H.R. Rep. No. 695, 69th Cong., 1st Sess. 4 (1926); Colin, An Analysis of the 1926 Amendments to the Bankruptcy Act, 26 Colum. L. Rev. 789, 792 (1926); and McLaughlin,

Amendment of the Bankruptcy Act, 40 Harv. L. Rev. 341, 366-68 (1927).

Thus, the 1926 amendment to Section 3 of the Act was intended to obviate the contention that the appointment of a receiver would constitute an act of bankruptcy only if a receiver was appointed "because of insolvency." The congressional analysis of the statutory amendments indicates that no further substantive change was intended to be effected in Section 3. Foley, however, attaches an unfounded significance to the deletion by Congress of the words "under the laws of a State, of a Territory, or of the United States," as did the dissenting opinion in the Court of Appeals. Foley studiously avoids any reference to the Congressional Record, for in fact, the Senate bill, S. 1039, retained the deleted language, 67 Cong. Rec. 6800 (1926), but, in conference, the words were subsequently stricken, the House managers stating that the "difference [between the Senate and House bills] consists merely in phraseology." H.R. Rep. No. 1257, 69th Cong., 1st Sess. 8 (1926). By reason of the foregoing, the dissenting opinion in the Court of Appeals recognized "that the principal focus of the drafters of the amendment was on remedying an ambiguity regarding the preliminary requirement of insolvency, and that the elimination of the necessity of formal appointment was said to be simply a matter of change of phraseology * * *." (Pet. App. "A" at 23). Hearings in the House of Representatives further demonstrate that the deletion of the quoted language was not meant to effect a substantive change. See Hearings Pursuant to H. Res. 353 on Revision of the Bankruptcy Law Before the House Comm. on the Judiciary, 68th Cong., 2d Sess., ser. 51 at

38-39 (1925); Hearings on H.R. 5521 and H.R. 8119 Before the House Comm. on the Judiciary, 69th Cong., 1st Sess., ser. 4, at 17 (1926).

The deleted language was undoubtedly surplusage, for a receiver would necessarily be appoint to take charge of a debtor's property "under the laws of a State, of a Territory, or of the United States." Similarly, a trustee would be so appointed or else would be an assignee for the benefit of creditors under the fourth act of bankruptcy. Of course, if an insolvent debtor had appointed the trustee otherwise than for the benefit of all its creditors, the transaction might be a fraudulent conveyance under the first act of bankruptcy or a preferential transfer under the second. The elimination of the foregoing language, however, cannot be deemed the repeal of the established substantive requirements as to a receiver or trustee within the purview of the Act. Foley has offered no authority that Congress meant the terms "receiver" or "trustee" in Section 3a(5) to include a person who did not have all of the accepted attributes of these officers.

3. The 1938 Amendment

Because some courts continued to require a showing of insolvency in the bankruptcy sense after the 1926 amendment, Congress further amended Section 3a(5) in 1938 to read in its present form, which includes both the bankruptcy and equity definitions of insolvency, stated alternatively. 1 Collier, Bankruptcy ¶3.501 at 496, 497 (14th Ed. 1972); 52 Stat. 844-845. The Senate Report emphasized that the purpose of the amendment was to expand the scope of the fifth act of bankruptcy "in order to reach the widely prevalent abuse of collusive equity receiverships," which af-

fected the rights of creditors. S. Rep. No. 1916, 75th Cong., 3d Sess. 12 (1938); see also H.R. Rep. No. 1409, 75th Cong., 1st Sess. 6 (1937), where the House Report states that the "amendment does not affect those equity receiverships which are legitimately instituted and prosecuted to preserve the assets" of a debtor. Again, Foley cites no authority whatsoever which would even tend to show that Congress meant to extend the meaning of the words "receiver" or "trustee" so as to include a liquidating agent. The equity receiverships to which Congress had directed its intention involved judicially appointed receivers of purportedly solvent enterprises which were unable to pay their debts as they matured and not agents authorized to liquidate or manage the business and properties of the debtor pursuant to private agreement.

The collusive equity receiverships existing prior to the adoption of the 1938 amendment were well known to the legislators. See, *e.g.*, *First National Bank* v. *Flershem*, 290 U.S. 504 (1934). While it is not disputed that the amendment of Section 3a(5) was intended to cure the evils inherent in the friendly equity receiverships, had Congress intended to expand the scope of the words "receiver" or "trustee," an appropriate amendment would have been made, as was done in connection with Sections 2a(21) and 69d. The Act does not state that the appointment of an agent authorized to liquidate the property of an alleged bankrupt is an act of bankruptcy. Foley has failed to and is unable to demonstrate the contrary or even the proposal of any amendment to the Act to effect the same. The Act does not make the appointment of such an agent the commission of an act of bankruptcy and there is in fact no authority to the effect that Congress ever intended to broaden Section 3 of the Act to the extent argued by Foley.

B. The Statutory Context of Section 3a(5)

Further evidence that Congress never intended the words "receiver" or "trustee" to mean a liquidating agent can be found by comparing Section 3a(5) with Sections 2a (21) and 69d of the Act. Section 2a(21) authorizes the bankruptcy court to "[r]equire receivers or trustees appointed in proceedings not under this Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property" to deliver the property in their possession or control to a representative of the bankruptcy court. Section 2a(21) was added in 1938 at the same time Section 3a(5) was amended. 52 Stat. 844. As the court below noted, "when the draftsmen desired to cover [the liquidating] agent, they considered it necessary to say so and knew how to do it." (Pet. App. "A" at 19). Amendments to Sections 2a(21) and 3a(5) were under consideration when the Chandler Act was before Congress in 1938. While the Chandler Act of 1938 did amend Section 2a(21) so as to include specifically the liquidating agent or person appointed for the purpose of liquidating a debtor's assets, no such reference can be found in Section 3a(5).

Congress also amended Section 69d of the Act in 1952 so as to provide that upon the filing of a petition, "a receiver or trustee, appointed in proceedings not under this Act, of any of the property of a bankrupt, an assignee for the benefit of creditors of a bankrupt, or an agent authorized to take possession of or to liquidate any of the property of a bankrupt" shall be accountable to the bankruptcy court for action taken after the filing of the petition, shall file a schedule of assets and liabilities, shall make a sworn statement of his administration of the estate, and shall not make

any disbursements or take other administrative action without authorization from the bankruptcy court. 66 Stat. 426. As explained by the House Committee, the 1952 amendment to Section 69d was made for the express purpose of including assignees for the benefit of creditors and liquidating agents within its coverage:

> "[The amendment] conforms the scope of Section 69d of the Act to that of Section 2a(21). Section 2a(21) gives the court jurisdiction to require receivers or trustees, appointed in proceedings not under the Act, as well as assignees for the benefit of creditors and agents authorized to take possession of or to liquidate a person's property, to deliver the property in their possession or under their control to a receiver or trustee appointed under the Act. Section 69d, spelling out that power, requires a receiver or trustee, not appointed under the Act, of any property of the bankrupt, to account to the bankruptcy court, *but does not include the assignee and agent. The bill adds the necessary language and clarification.*" [Emphasis supplied.]

H.R. Rep. No. 2320, 82d Cong., 2d Sess. 15 (1952). Thus, Congress demonstrated again that a liquidating agent was not the equivalent of a "receiver" or "trustee". When Congress thought it necessary to bring a liquidating agent within the coverage of the statute, it made appropriate amendments thereto. Significantly, however, Congress neither made nor proposed any such amendment for Section 3a(5).

C. Foley has cited no valid authority for the proposition that the Liquidator was a receiver or trustee.

Foley cites several cases for the purpose of demonstrating that the Liquidator was the equivalent of a receiver or trustee within the meaning of Section 3a(5) of the Act.

Analysis of Foley's purported authorities readily discloses that they are erroneously cited and are of no persuasive value.

Blum Bros. v. *Girard Nat'l Bank*, 248 Pa. 148, 93 A. 940 (1915), *Hannon* v. *Mechanics Bldg. & Loan Ass'n of Spartanburg*, 177 S.C. 153, 130 S.E. 873 (1935) and *Jennings Sewer Dist. of St. Louis County* v. *Pitcain*, 238 Mo. App. 704, 187 S.W. 2d 750 (1950) are cited to show that a receiver has no title to an insolvent debtor's property (Petitioners' Brief at 20). Apparently, Foley contends that since the Liquidator has no title, he is therefore the equivalent of a receiver. The three cases cited, however, actually underscore the distinction between the Liquidator and a receiver. In the *Blum* case, *supra*, while it was held that a receiver does not acquire legal title to the debtor's assets, the receiver in question was also held to be "clothed with a kind of equitable title to be worked out under the order and direction of the *appointing court.*" 93 A. at 941. [Emphasis supplied.] Thus, unlike the Liquidator in the case on appeal, the receiver there was court-appointed.

Similarly, in the *Hannon* case, *supra*, the receiver was court-appointed and the court emphasized that it, not the insolvent debtor with title, had the right to dispose of the debtor's property, in contrast to the instant case. The *Jennings* case, *supra*, also dealt with a court-appointed receiver, as expressly conceded by Foley (Petitioners' Brief at 19). Indeed, Foley notes that the receiver in that case had "power to act under [the court's] direction." *Id.*

Foley cites *Marvin* v. *Brooks*, 94 N.Y. 71 (1883) apparently for the proposition that an "agent in possession of

property, which is the subject of his agency has been held to be a quasi trustee. * * *" (Petitioners' Brief at 19). Obviously, an agent owes a fiduciary duty to his principal, but the *Marvin* case does not shed any light on the issue before this Court. The case is not authority for the proposition that an agent authorized to liquidate any of the property of an alleged bankrupt is a trustee.

Respondents have never contended that the Liquidator's title is determinative of the issue on appeal. Accordingly, *Hayden Plan Co.* v. *Wood*, 97 Cal. App. 1, 275 P. 248 (1929) and *Gittings* v. *Morris*, 156 Md. 565, 144 A. 836 (1929), cited by Foley (Petitioners' Brief at 11), are not apposite. *McMullin* v. *Keogh-Doyle Meat Co.*, 96 Colo. 298, 42 P.2d 463 (1935) is also not on point, for it expressly dealt with a general assignment under the fourth act of bankruptcy set forth in Section 3a(4) of the Act and involved a transfer of the debtor's assets, a wholly different case from the one on appeal.

Foley cites *In re International Coal Min. Co.*, 143 F. 665 (E.D. Pa. 1906) and *Fish* v. *East*, 114 F.2d 177 (10th Cir. 1940) for the proposition that the manner of the Liquidator's appointment is not relevant (Petitioners' Brief at 17, 18). The *International Coal* case dealt with the turnover by an insolvent debtor of his assets to the local sheriff, who was a court-appointed officer and who received the assets pursuant to a court order. Similarly, the insolvent debtor's turnover of assets in *Fish* v. *East, supra,* was made to the trustee in bankruptcy of the debtor's parent corporation pursuant to court order. Both of the aforementioned cases are easily distinguishable, for the debtors transferred their assets to court-appointed officers who

were subject to the jurisdiction of a court and who could affect the rights of the debtors' creditors.

Foley apparently cites *In re Electric Supply Co.*, 175 F. 612 (S.D. Ga. 1909) by mistake (Petitioners' Brief at 14, 15). Although the case is cited properly for the proposition that the appointment of a receiver is harmful to the rights of creditors, the court in that case discussed briefly the consequences to creditors of the appointment of a receiver by a state court:

> "• • • [T]he provisions of the bankrupt law would become operative, and *the court of another jurisdiction would have no right to sequester the property and restrain creditors otherwise entitled to proceed in the bankruptcy court.*" 175 F. at 618. [Emphasis supplied.]

The foregoing excerpt underscores how creditors would be prejudiced by the appointment of a receiver within the meaning of Section 3a(5) of the Act. As previously demonstrated, the Liquidator of Blair did not have the power, however, to stay any of the debtor's creditors from proceeding to judgment or from filing an involuntary petition in bankruptcy against it.

Petitioners have cited no valid authority to support their tenuous position. Authorities which they cite actually support the decision of the court below. Other cases cited are inapposite. Accordingly, the Court of Appeals correctly held that the Liquidator was not a "receiver" or "trustee" within the meaning of Section 3a(5) of the Act.

IV

Section 3a(5) of the Bankruptcy Act is specific and need not be judicially enlarged.

Foley states that Blair sought "to avoid the paramount and exclusive jurisdiction of the Bankruptcy Courts" by agreeing to the appointment of the Liquidator (Petitioners' Brief at 23). The Court of Appeals noted (Pet. App. "A" at 20) that Foley's purported "policy" arguments disregard the act of bankruptcy requirement set forth in Section 3 of the Act, as well as the legal significance of the terms "receiver" and "trustee" set forth in Section 3a(5). In essence, Foley contends that the appointment of the Liquidator should constitute an act of bankruptcy, despite the fact that Congress did not specify an agent authorized to liquidate a debtor's property in Section 3a(5), but did do so in Sections 2a(21) and 69d of the Act.

Unless included within Section 3a of the Act, no action by an insolvent debtor can sustain an involuntary bankruptcy proceeding. 1 Collier, Bankruptcy ¶3.03 at 403 (14th Ed. 1972). Congress has thus made a policy determination that a debtor cannot be subjected to involuntary bankruptcy "unless he has done * * * certain acts * * * concerning his property" which prejudice the rights of his creditors. 1 Collier, *supra;* see Treiman, Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law, 52 Harv. L. Rev. 189, 201 (1938); Note, "Acts of Bankruptcy" in Perspective, 67 Harv. L. Rev. 500, 503 (1954). The Court of Appeals also noted this Court's explanation of the act of bankruptcy requirement in *Cook* v. *Tullis,* 85 U.S. (18 Wall.) 332, 340 (1874).

> "There is nothing in the Bankruptcy Act, either in its language or object, which prevents an insolvent from dealing with his property, selling or exchanging it for other property at any time before proceedings in bankruptcy are taken by or against him, provided such dealing be conducted without any purpose to defraud or delay his creditors or give preference to any one, and does not impair the value of his estate. An insolvent is not bound, in the misfortune of his insolvency, to abandon all dealing with his property; his creditors can only complain if he waste his estate or give preference in its disposition to one over another. His dealing will stand if it leaves his estate in as good plight and condition as previously."

Foley has never proved and is in fact unable to prove any fraudulent purpose or activity on the part of the Liquidator in his administration of the Blair estate. Further, of the approximately 28,000 other Blair creditors, not one ever joined Foley in the prosecution of the involuntary petition in bankruptcy or supported the position of Foley.

The Bankruptcy Act should not be enlarged by judicial fiat in order to include a particular set of facts which may appear to be analogous to a specific act of bankruptcy, but which was manifestly excluded by Congress. As one court has held:

> "[T]his statute (while remedial) should be construed strictly * * *. In other words, its scope should not be enlarged so as to include transactions that may appear to be analogous but are obviously not contemplated by the statute. A court of bankruptcy has no power to extend the Bankruptcy Act * * *."

Maplecroft Mills v. *Childs*, 226 F. 415, 419 (4th Cir. 1915). Moreover, it is established that "when acts of bankruptcy

are classified * * * it is not the province of the court to enlarge the classification * * *." *In re Empire Metallic Bedstead Co.*, 98 F. 981, 982 (2d Cir. 1899).

Foley suggests that the appointment of the Liquidator constituted an abridgement of the rights of Blair's creditors (Petitioners' Brief at 8), but Foley is silent as to how the rights of Blair's creditors were affected after the Liquidator's appointment. As stated by the Court of Appeals, Blair's creditors were not prevented from alleging any other act of bankruptcy, such as a fraudulent conveyance, a preferential transfer or the debtor's failure to vacate or discharge a lien, in order to subject Blair to involuntary bankruptcy during the Liquidator's tenure (Pet. App. "A" at 21). In fact, Foley purported to allege two other acts of bankruptcy* in the involuntary petition (27A-28A), but "no serious attempt was made to support [them] before the referee, in the district court or [in the Court of Appeals]" (Pet. App. "A" at 14).

In contending that the holding of the court below would deprive the bankruptcy court of jurisdiction over the Blair estate (Petitioners' Brief at 8), Foley ignores the facts of the case on appeal. First, as stated, Blair's creditors were never prevented from alleging any other act of bankruptcy in order to subject Blair to the jurisdiction of the bankruptcy court. Congress, however, never intended the bankruptcy court to have "paramount" or exclusive jurisdic-

* Foley's suggestion that certain withdrawals from the debtor's capital in 1969 constituted fraudulent conveyances (Petitioners' Brief at 7) has also never been proven or supported by Foley, despite repeated requests inviting Foley to do so. Accordingly, it is submitted that Foley is thus obscuring the real issue before this Court.

tion over every insolvent debtor, as this Court has recently noted:

> "[B]ankruptcy is not the only method available to a debtor for the adjustment of his legal relationship with his creditors * * *. [A] debtor, in theory, and often in actuality, may adjust his debts by negotiated agreement with his creditors * * *. Resort to the Court, therefore, is not [the debtor's] sole path to relief." *United States* v. *Kras*, —— U.S. ——, 92 S.Ct. 631, 638 (1973).

Indeed, in a concurring opinion, Chief Justice Burger stated that "the bankruptcy court is but one mode of orderly adjustment with creditors; it is not the only one since many debtors work out binding private adjustments with creditors." 92 S.Ct. at 640.

Secondly, Foley ignores the filing of a petition for an arrangement under Chapter XI of the Act by Blair on April 15, 1971. As a result thereof, Blair now is subject to the "exclusive jurisdiction" of the bankruptcy court. Section 311 of the Act, 11 U.S.C. §711. Indeed, the pending Blair arrangement proceedings render academic the issue presented to this Court, as previously discussed herein.

Foley has submitted no rational or legal basis to support a judicial enlargement or modification of the fifth act of bankruptcy. The decision of the Court of Appeals is consistent with established rules of statutory construction. Indeed, the dissenting opinion in the court below noted that the "approach of the majority cannot be said to be an unreasonable one" (Pet. App. "A" at 24). There has been no showing of any error in the decision of the Court of Appeals and Foley has advanced no supportable reason which would warrant any disturbance of that decision.

Conclusion

The judgment of the Court of Appeals should be affirmed in all respects.

Respectfully submitted,

HARVEY R. MILLER
Attorney for Respondents
767 Fifth Avenue
New York, New York 10022
(212) 758-7800

CHARLES SELIGSON,
MICHAEL L. COOK,
DONALD J. ZOELLER,
Of Counsel.

July 27, 1973